Software Rights Archive, LLC v. Google Inc. et al Doc. 147

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THE APPLE IPOD ITUNES ANTI-TRUST LITIGATION	Lead Case No. C-05-00037-JW(RS)
	CLASS ACTION
This Document Relates To: ALL ACTIONS.	REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL DEFENDANT APPLE, INC.'S PRODUCTION OF DOCUMENTS RELATING TO CLASS CERTIFICATION
	DATE: January 16, 2008 TIME: 9:30 a.m. COURTROOM; 4, 5th Floor JUDGE: Magistrate Judge Richard Seeborg

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I. INTRODUCTION

In Apple's Opposition to Motion to Compel Production of Documents "Relating to Class Certification," filed December 21, 2007 ("Opposition"), Apple fails to rebut Plaintiffs' showing that the information sought by this motion is relevant to class certification, and fails to demonstrate that production of the data would impose anything other than a *de minimis* burden on Apple. For these reasons, this Court should grant Plaintiffs' motion to compel.

II. THE FINANCIAL DATA PLAINTIFFS SEEK IN REQUESTS FOR PRODUCTION NO. 10 AND NO. 19 ARE RELEVANT TO CLASS CERTIFICATION

As Plaintiffs demonstrated in their opening papers, profit and cost data are relevant to their class certification motion, and are routinely used in antitrust class certification expert reports.[1]

In *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation* ("*DRAM Antitrust*"), for example, Judge Hamilton, in certifying the class, found that "the three damage methodologies identified by [Plaintiffs' economist] – have been upheld by numerous courts." *In re Dynamic Random Access Memory Antitrust Litig.*, No. M 02-1486 PJH, 2006 U.S. Dist. LEXIS 39841, at *46 (N.D. Cal. June 5, 2006). One of those three widely recognized methodologies for proving damages – the "operating margin approach" – requires examination of the defendant's revenue and cost data. *See id.*, at *48. While plaintiffs are not required at the class certification stage to conduct a full-blown damage analysis, they must advance a "plausible methodology" and demonstrate that the evidence they intend to present at trial will rely upon common proof. *Id.*, citing *In re Bulk [Extruded]Graphite Prod. Antitrust Litig.*, Civ. No. 02-6030 (WHW), 2006 U.S. Dist. LEXIS 16619, at *44 (D.N.J. Apr. 4, 2006); *In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374, 384 (S.D.N.Y. 1996).

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[1] Defendant devotes much of its Opposition to rehashing its assertion that Plaintiffs' theory is "unprecedented" and contrary to the spirit of the antitrust laws. Opposition at 1:23-2:18. Though Plaintiffs disagree with most of the statements in this portion of Defendant's Opposition and could reply in detail, it more than suffices to note that Defendant's rehashed arguments have twice already been rejected by Judge Ware. *See Slattery v. Apple Computer, Inc.*, No. C 05-00037 JW, 2005 WL 2204981 (N.D. Cal. Sept. 9, 2005); *Tucker v. Apple Computer, Inc.*, 493 F. Supp. 2d 1090 (N.D. Cal. 2006).

Plaintiffs have no data available to determine whether the operating margin methodology could be used in this case to estimate damages.[2] The cost and revenue information is solely in Apple's hands.

Request No. 19 narrowly seeks the data necessary to use the operating margin methodology for estimating damages:

> All Documents necessary to allow the calculation for each quarter since the introduction of the iPod for each model that iPod has sold, the number of iPods that have been purchased, Apple's total revenue from the sale of each iPod model and ***Apple's Cost of Manufacturing*** and cost of sale for each iPod model.

Request No. 19 (emphasis added). For these reasons, the requested data are relevant to class certification and should be produced.

Defendant states that Plaintiffs "neglect to mention" that it produced "sales information." Opposition at 4:20-24. However, Apple has steadfastly refused to produce any ***iPod cost data***, and Plaintiffs seek both cost and sales data for the various iPod models.

Apple also argues that Plaintiffs' motion should be denied because a Plaintiff in one of the two consolidated cases filed a motion for class certification without the benefit of the data Plaintiffs now seek through this motion. This argument fails as a matter of logic. The standard under the Discovery Order currently in effect is whether Plaintiffs' requests are related to class certification and/or impose a *de minimis* burden. *See generally* Order re: Plaintiffs' Motion for Administrative Relief, entered July 20, 2007 ("Discovery Order"). Both standards are met here.

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2 Plaintiffs do, however, have some data that could be used to model the other two damages methodologies approved by Judge Hamilton in *DRAM Antitrust* and by numerous other courts – the "before/after" methodology, which compares prices during the period of anticompetitive conduct to prices in effect either prior to or after the anticompetitive conduct period, and the "yardstick" approach, which compares pricing trends in the subject market to pricing trends in a comparable market not affected by anticompetitive conduct. *DRAM Antitrust*, 2006 U.S. Dist. LEXIS 39841, at *48. While plaintiffs do not possess all of the transactional data necessary to conduct a final analysis under either of these alternative approaches (and are not required to at class certification), some of this data is available from public sources or has been produced by Apple.

III. THE *DE MINIMIS* BURDEN OF PRODUCTION PROVIDES A SECOND AND INDEPENDENTLY SUFFICIENT BASIS FOR COMPELLING PRODUCTION OF THE UNREDACTED SPREADSHEETS AND THE IPOD DATA THAT DEFENDANT ADMITS IT COMPILES "IN ITS ORDINARY COURSE OF BUSINESS"

Judge Ware's Discovery Order also allows "the production of documents whose production would impose only a *de minimis* burden on either party." *Id.* at 2:1-2 Apple does not dispute that simply providing unredacted copies of spreadsheets it has already produced in redacted form imposes anything other than a *de minimis* burden. Thus production of these spreadsheets should be compelled.

Regarding the iPod data, Defendant provided a declaration of one of its employees stating that "[i]n its ordinary course of business" it "analyzes the financial performance of the iPod on a worldwide . . . basis" and that producing United States revenue and cost data would take only "two to three days." *See* Declaration of Charles Lancaster in Support of Apple's Opposition to Motion to Compel Production of Documents Relating to Class Certification, filed December 21, 2007 ("Lancaster Decl.") at 2:8-9.

Plaintiffs submit that production requiring only "two to three days" would, in Judge Ware's words, "impose only a *de minimis* burden" on Defendant. *Id.*; Discovery Order at 2:1-2. However, Plaintiffs did not ask for United States data, they simply requested:

> All Documents necessary to allow the calculation for each quarter since the introduction of the iPod for each model that iPod has sold, the number of iPods that have been purchased, Apple's total revenue from the sale of each iPod model and Apple's Cost of Manufacturing and cost of sale for each iPod model.

Request No. 19.

While production of data broken down by region might be helpful, the words "United States" appear nowhere in any of Plaintiffs' requests for production of documents, much less the request at issue. Given Mr. Lancaster's admission, that "[i]n its ordinary course of business, Apple analyzes the financial performance of the iPod on a worldwide rather than a regional basis" (Lancaster Decl., at 2:8-9), production of the financial data Plaintiffs request, in the form that it presently exists, would certainly impose no more than a "a *de minimis* burden" on Defendant. Discovery Order at 2:1-2.

IV. CONCLUSION

The financial data Plaintiffs seek is discoverable under Judge Ware's recent Discovery Order both on the basis of its clear relevancy to class certification, and independently on the grounds that it would "impose only a *de minimis* burden" on Defendant. Discovery Order at 2:1-2. For the foregoing reasons, Plaintiffs' motion to compel should be granted.

DATED: January 2, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 2, 2008.

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